No. 93-517

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE
KIRYAS JOEL VILLAGE SCHOOL DISTRICT,

Petitioner,

VS.

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

ON WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

BRIEF OF *AMICUS CURIAE* THE ARCHDIOCESE OF NEW YORK IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus, the Archdiocese of New York, will address the following issue:

Whether *Lemon* and the "primary effect" test should be overruled and replaced with a standard that permits a State to enact legislation addressing the secular needs of a community sharing a common religious faith.

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INTEREST OF THE *AMICUS*

The Archdiocese of New York (the "Archdiocese") is the third largest Roman Catholic Archdiocese in the United States. Over two million Catholics reside within the Archdiocese. The area it covers includes Manhattan, Staten Island and the Bronx, as well as seven counties in upstate New York, including Orange County, in which the Village of Kiryas Joel is located.

Through the efforts of staff and volunteers at more than 200 agencies affiliated with Catholic Charities of the Archdiocese of New York, the Archdiocese supports various charitable activities and provides a wide array of social services to people of all religions. Such services include, among other things, health care, nursing home care, child care, immigrant aid, assistance to the homeless, the indigent and those suffering with AIDS. The people who benefit reflect the diversity of their communities. The Archdiocese has a special interest in cases before this Court concerning religion's place in American society and the proper interpretation of the Establishment Clause.

This brief will explain why the Court's apparent effort to maintain a "wall of separation between church and state" -- a threshold of dubious merit -- through application of the test adopted in *Lemon v. Kurtzman*, has frequently led to "callous indifference," if not hostility, to religion. In the Archdiocese's view, application of the *Lemon* test in Establishment Clause jurisprudence over the past 20 years has spawned confusion in the lower courts and conflict among members of this Court. The time has come to abandon *Lemon* and to replace it with an historically valid approach that focuses on the overriding purpose of the First Amendment to promote religious liberty.

STATEMENT

In the interest of brevity, the Archdiocese adopts the statement included in the petitioner's brief.

SUMMARY OF ARGUMENT

The New York Court of Appeals applied the *Lemon* test, the concept of the "symbolic union of church and state" and the "endorsement" test and held that the government accommodation of religion was barred. These subjective tests -- and the metaphorical "wall of separation of church and state" which fostered them -- are not useful analytical tools for determining Establishment Clause violations and should be discarded.

This Court should adopt an approach which begins by focusing on the text of the Constitution, the principles on which it is based and the historical context surrounding its enactment. Within that framework, this Court should require a showing of coercion by force of law, or of government-proselytization. Under this approach, the creation of the Kiryas Joel Village School District is constitutional as it neither coerces religious belief nor intentionally seeks to persuade anyone to adopt the tenets of a particular religious faith.

ARGUMENT

I. *GRUMET* UNDERSCORES THE DEFICIENCIES OF THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE AND PROVIDES A RARE OPPORTUNITY FOR A FRESH APPROACH

A year and a half ago, this Court, in deciding *Lee v. Weisman*, 112 S.Ct. 2649 (1992), noted that it was not an appropriate case in which to revisit the question of "the extent of permitted accommodation by the State for the religious beliefs and practices of many of its citizens." *Id.* at 2655. The majority characterized the challenged action there as a "state-sponsored and state-directed religious exercise" in direct conflict with "fundamental limitations imposed by the Establishment Clause." *Id.* Accordingly, there was no occasion to "reconsider the general constitutional framework by which public schools' efforts to accommodate religion are measured." *Id.*

Categories of state action that plainly run afoul of the Establishment Clause include direct government subsidies of solely religious activities and state-enforced indoctrination of sectarian beliefs. Similarly, religious accommodations that on their face are recognizable as laws "respecting the establishment of religion" are easily struck down as unconstitutional. None of these cases require staking out the constitutional framework for delimiting governmental accommodation of religion. The state actions involved are limited by the literal language of the Constitution itself.

More often, however, the cases presented to this Court pose intractable questions. They involve state acts of religious accommodation neither mandated by the Free Exercise Clause nor facially prohibited by the Establishment Clause. The decisions in these cases have been plagued by doctrinal inconsistency and flawed by the profound rifts that have divided this Court over the years, and continue to do so. *Compare Weisman*, 112 S.Ct. at 2678 (Souter, J., concurring) (to be permissible under the Establishment Clause, "accommodation must lift a discernible burden on the free exercise of religion") *with Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 39 (1989) (Scalia, J., dissenting) ("[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause").

Grumet is such an interstitial case. A Free Exercise claim is not raised, nor is the establishment of a union free school district facially the establishment of religion. The Legislature made a discretionary accommodation. Manifestly, the parties dispute whether the New York Legislature and Executive effected a "pure accommodation" -- solely catering to strictly religious needs -- or a "mixed accommodation" -- bestowing benefit on both secular needs and religion. Regardless, the question of the scope of permissible government accommodation to religion under the Establishment Clause is squarely before this Court. This Court should also reassess the rules, tests, and rubric it has provided to courts of this country as guidance. In *Grumet*, the

New York Court of Appeals talismanically invoked the *Lemon* test and resorted to the shibboleths of "symbolic union" and "endorsement" in striking down Chapter 748. This test and each of these terms originated with this Court.

A. The *Lemon* Test Is Unprincipled and Unworkable and Led the New York Court of Appeals to Wrongly Decide *Grumet*

The *Lemon*[1] test has been roundly criticized as being both unprincipled and unworkable.[2] Each prong of the *Lemon* test is beset with problems, and the end result of the combined test is a structural bias that is hostile toward religion.

The "secular purpose" prong of the *Lemon* test requires courts to divine specific legislative intent. This difficult chore is made more difficult still by this Court's failure to provide any clear guidelines for determining when legislative purposes are insufficiently secular to pass muster. *See Edwards v. Aguillard*, 482 U.S. 578, 613-18 (1987) (Scalia, J., dissenting).

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[1] In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court announced a three-prong test to determine the constitutionality of a statute. To survive an Establishment Clause challenge a statute must: (1) "have a secular legislative purpose"; (2) its "principal or primary effect" must be one that "neither advances nor inhibits religion"; and (3) the statute "must not foster an excessive entanglement with religion." *Id.* at 612-13.

[2] *See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S.Ct. 2141, 2150 (1993) (Scalia, J., dissenting) (agreeing with scholars who "bemoan[] the strange Establishment Clause geometry of crooked lines and wavering shapes [*Lemon's*] intermittent use has produced"); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 655-57 (1989) (Kennedy J., concurring in judgment in part and dissenting in part) ("substantial revision of our Establishment Clause doctrine may be in order"); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115 (1992) [hereinafter *Religious Freedom*]; Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673 (1980).

More pertinently, the "secular purpose" test is intrinsically and unjustifiably hostile to religion. The corollary of the requirement that a challenged law must have "a secular" purpose is the proposition that a law with "a discernible religious" purpose -- even though a secular purpose may have animated the law as well -- is constitutionally suspect. Viewed through the distorting prism of the secular purpose test, the laws abolishing slavery and safeguarding the civil rights of blacks and other minorities could conceivably be considered constitutionally suspect, because these laws were not only consonant with religious tenets but also were undeniably, in part, religiously motivated.

Citizens are not obliged under the Establishment Clause to check their religious beliefs at the door as the price of their participation in the political process. *See id.* at 615 (Scalia, J., dissenting); *cf. McDaniel v. Paty*, 435 U.S. 618 (1978) (disqualification of clergy from political office violates religious freedom protected by the Religion Clauses); Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* 113 (1993) (noting such an approach "represents a sweeping rejection of the deepest beliefs of millions of Americans, who are being told, in effect, that their views do not matter").

Although the "secular purpose" test has been narrowed so as to reach only those laws which are "wholly motivated by a religious purpose," *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984), it still cuts too wide a swath. Religion is recognized by the Free Exercise Clause as having a value for its own sake independent of anything secular. Indeed, the independent significance of religion has often been reflected in this country's laws and regulations. *See, e.g., Drug Enforcement Administration Miscellaneous Exemptions*, 21 C.F.R. § 1307.31 (1991) (exempting Native American Church from Federal law banning peyote use). As Justice O'Connor has recognized: "It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of

religion by lifting a government-imposed burden." *Wallace v. Jaffree*, 472 U.S. 38, 83 (O'Connor, J., concurring in judgment). Further, this Court has upheld laws which were designed solely for the purpose of aiding religion, even when the Free Exercise Clause did not mandate such aid. *See, e.g., Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding "released time" program for religious instruction).

Despite its troubled history, dubious current status and inability to adequately measure the boundaries of the Establishment Clause, the "secular purpose" test is still used by courts to decide sensitive questions concerning the relations between government and religion. Indeed, it was applied by a concurrence in *Grumet*. *Grumet v. Bd. of Educ.*, 81 N.Y.2d 518, 540-45, 601 N.Y.S.2d 61, 74-77 (1993) (Hancock, J., concurring).

The "primary effects" prong of the *Lemon* test is no less problematical and, if possible, is even more skewed against religion. Any "pure accommodation" of religion could in theory be automatically invalidated. Where the only effect of a statute is religious, that effect is *de facto* the "primary" effect.[3] In "mixed accommodation" cases, the "primary effect" test ostensibly calls for the comparison and evaluation of "secular" and "religious" effects as "primary" or "secondary." *See Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 823 (1973) (White, J., dissenting) ("the test is one of 'primary' effect not *any* effect"). At first glance, this second prong of the *Lemon* test has at least an air of fairness and impartiality about it. However, just as it failed to provide clear guidance on applying the "secular purpose" test, this Court has never explained the method by which effects are to be classified as primary or secondary nor how to measure or value "secular" and "religious" effects.

[3] The apparent origin of the phrase "primary effect" is *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963), a school prayer case. Because prayer was the *only* effect considered in that case, the "primary" effect of the challenged government activity was held to be religious.

The practical impossibility of deciding whether a particular statute's secular effects outweigh its religious effects has led the courts to sidestep the balancing process altogether. Accordingly, the level of permitted religious effects has been ratcheted down to near the vanishing point. Thus, this Court has held that a religious effect is permissible only if "indirect, remote or incidental," *see Lynch*, 465 U.S. at 683; *Nyquist*, 413 U.S. at 774-80; *Widmar v. Vincent*, 454 U.S. 263, 273-74 (1981), or "attenuated," *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 488 (1986). To pass scrutiny under this approach, the religious effect must be minute or minimal in absolute terms, rather than in the comparative sense the wording of the original test requires. Other cases reveal still more clearly that the "primary effects" test, as administered by the courts, presupposes that a law must be invalidated, irrespective of its secular benefits, if its religious effect exceeds an ill-defined absolute limit. In those cases, a comparison is made not between the secular and religious effects of the state action, but between its religious effects and the religious effects of other enactments that were found acceptable in prior cases. *See, e.g., Lynch*, 465 U.S. at 681-82. In still other cases, any bona fide comparison of the "secular" and "religious" effects has been avoided by characterizing the religious effects as "absolutely prohibited" or, in effect, *per se* "primary." *See, e.g., Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985).

The third prong of *Lemon*, the "excessive entanglement" test, has also been criticized[4] extensively and when combined with the "primary effects" test, creates a classic no-win situation for religion. The "primary effects" test requires that the state be "certain" that religious organizations receiving government aid for secular services do not use that aid to inculcate religion. *Lemon*, 403 U.S. at 619. But the very monitoring necessary to ensure that the "primary effects" test requirement is met results in the government's "excessive entanglement." *See, e.g.,*

[4] *See, e.g., Aguilar v. Fenton*, 473 U.S. 402, 426-30 (1985) (O'Connor, J., dissenting); *Wallace*, 472 U.S. at 109-110 (Rehnquist, J., dissenting).

Aguilar, 473 U.S. at 409 ("system for monitoring the religious content of publicly funded Title I" program fails "entanglement" prong). Although this Catch-22 aspect of the "entanglement" test and its in-built bias against religion have been recognized, *Bowen v. Kendrick*, 487 U.S. 589, 615 (1988), it continues to be applied. Indeed, the New York Supreme Court in *Grumet* held that Chapter 748 failed the "entanglement" test precisely because the State "must take special steps to monitor the newly created school district to ensure that public funds are not expended to further religious purposes." *Grumet v. New York State Educ. Dep't*, 151 Misc.2d 60, 65, 579 N.Y.S.2d 1004, 1007 (Sup. Ct. 1992).

In sum, the *Lemon* test has generated *ad hoc*, inconsistent, and unprincipled results. As Chief Justice Rehnquist noted, these inconsistencies are apparent in the Court's decisions dealing with school aid. *Wallace*, 472 U.S. at 110-11 (Rehnquist, J., dissenting).

The Court of Appeals applied *Lemon* "to consider whether the principal or primary effect of the challenged statute advances or inhibits religion." *Grumet v. Bd. of Educ.*, 81 N.Y.2d at 527, 601 N.Y.S.2d at 66. It did so in one sentence, stating that "[b]ecause special services are already available to the handicapped children of Kiryas Joel, the primary effect" is "to yield to the demands of a religious community." *Id.* at 531, 601 N.Y.S.2d at 68. By postulating that the secular benefit sought was already available, the Court of Appeals predetermined the outcome under the effects test. If "already available" services were the only secular benefit to be obtained, the statute could have no secular effect. Thus, the "primary" effect, would be, as the court inevitably concluded, the "religious" one of the State's yielding to religious demands for separation. The court ignored the school district's asserted secular purpose -- non-traumatic special education services -- and committed the error of "focusing . . . exclusively on the crèche." *Lynch*, 465 U.S. at 680. For to "focus exclusively on the religious component of

any activity . . . inevitably lead[s] to its invalidation under the Establishment Clause." *Id.*

However, even had a secular effect been acknowledged, the outcome would have been the same. In the court's view "*[r]egardless* of any beneficent purpose behind the legislation, the primary effect of such an extensive effort to accommodate . . . inescapably conveys a message of government endorsement of religion. Thus a 'core purpose of the Establishment Clause is violated.'" *Grumet*, 81 N.Y.2d at 531, 601 N.Y.S.2d at 68 (emphasis added). Under this reasoning, whatever the actual secular effect was is irrelevant: the secular effect cannot be "primary" when there has been "endorsement," since the message of endorsement is *per se* primary.

Grumet also exemplifies the instinctive reach for an absolute and minimalist measure of "religious" effect that is associated with *Lemon*. The Court of Appeals stated that creation of the school district "goes beyond any directive by the Supreme Court . . . for the provision of special services to handicapped children at a neutral site." *Id.* at 530, 601 N.Y.S.2d at 68. Like many courts that have applied *Lemon*, the Court of Appeals assumed some fixed upper limit existed on what may be permissibly done to accommodate religion regardless of the state action's secular and religious effects.

It must be said that the *Grumet* court used *Lemon*, not as a test which evaluates, measures, compares and in some principled fashion winnows the chaff from the grain, but simply as a talisman. The ultimate question before the court was "whether the statute . . . at issue [was] a step toward establishing a state religion." *Wallace*, 472 U.S. at 89 (Burger, C.J., dissenting). Nowhere in the court's opinion, however, is that core question addressed.

The confusion engendered by *Lemon* has perplexed lawmakers as well as the courts. A legislature, grappling with legislation that has both secular and religious overtones, is

required to engage in often highly subjective fact-finding to clear the hurdles imposed by *Lemon*. This places tremendous burdens on legislative efforts at religious accommodations. Too often, legislatures are forced to concoct Rube Goldberg-type solutions with no real confidence that they have correctly predicted how courts will apply *Lemon* the next time a challenge is brought.

Ultimately, *Lemon* has promoted secularism at the expense of religion and religious diversity. *See Allegheny*, 492 U.S. at 612 (purpose of Establishment Clause is to protect "logic of secular liberty"); *Religious Freedom, supra*, at 116 ("Court's conception of the First Amendment more closely resembled freedom *from* religion (except in its most private manifestations) than freedom of religion"). The courts have transformed appropriate concern over the dangers of government favoritism of particular religions into a judicially-driven social program that pushes religion to the margins of public life. Professor Tribe has pungently observed that "it seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the Framers." Laurence H. Tribe, *American Constitutional Law* 834 (1978). Moreover, the fastidiousness sometimes exhibited in this judicial effort to keep government pure from any "taint" of religion has inevitably trivialized religion. *Compare Lynch*, 465 U.S. at 671 (nativity scene display upheld where surrounded by plastic reindeer, Santa Claus house, Christmas tree, "Season's Greetings" banner, and talking wishing well) *with Allegheny*, 492 U.S. at 598-600 (nativity scene display surrounded by poinsettias banned).

Despite the persuasive criticism leveled against *Lemon* by scholars and Justices of this Court over the years, this Court has not seen fit to reassess Establishment Clause jurisprudence. *See Lamb's Chapel*, 113 S.Ct. at 2148 n.7. It may now at last be time to take up the challenge laid down by Justice Stewart:

> I think it is the Court's duty to face up to the dilemma

> . . . For so long as the resounding but fallacious fundamentalist rhetoric of some of our Establishment Clause opinions remains on our books, to be disregarded at will. . .or to be indiscriminately invoked. . .so long will the possibility of consistent and perceptive decisions in this most difficult and delicate area of constitutional law be impeded and impaired. And so long, I fear, will the guarantee of true religious freedom in our pluralistic society be uncertain and insecure.

Sherbert v. Verner, 374 U.S. 398, 416-17 (1963) (Stewart, J.).

B. *Grumet* Demonstrates the Fallacy of the "Symbolic-Union-Perceived-as-Endorsement" Test

The Court of Appeals summarized the supposed fatal defects of Chapter 748 as follows:

> [T]he statute not only authorizes a religious community to dictate where secular educational services shall be provided to the children of the community, but also "creates the type of *symbolic impact* that is impermissible under the second prong of the *Lemon* test."

Grumet, 81 N.Y.2d at 528, 601 N.Y.S.2d at 66-67.[5] The impermissible symbolic impact that so concerned the Court was the creation of a "symbolic union of church and State." *Id.* at 528, 601 N.Y.S.2d at 66.

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[5] The first of these two purported flaws is revealing. Any statute that creates a school district "authorizes" the subject community to "dictate" where its children will be educated. Apparently, what the Court found objectionable was that the community given this authority is "religious." But this has never constituted a valid Establishment Clause objection. *See Bradfield v. Roberts*, 175 U.S. 291 (1899). This Court has never disqualified state aid of any kind on the sole ground that it was being provided to a "pervasively sectarian" population.

The concept of "symbolic union" was born in *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985) and has a specific meaning limited to narrow and highly particular interactions between the government and religion. *Ball* struck down two state programs that taught secular subjects in parochial school settings on the ground they violated the "primary effects" prong of the *Lemon* test. The *Ball* Court found two absolutely prohibited effects: "government-financed . . . indoctrination into the beliefs of a particular religious faith," *id.* at 385, and "direct aid to the educational function of the religious school . . . indistinguishable from the provision of a direct cash subsidy to the religious school," *id.* at 395. It also identified a third "impermissible effect": "the symbolic union of government and religion in one sectarian enterprise." *Id.* at 392.

In *Ball*, the specific relationship between church and state was that of leasor/leasee, but the physical presence of public school teachers conducting classes in a religious school was regarded by the Court as symbolizing "state endorsement and encouragement of the religious beliefs taught in the same class at some other time during the day." *Id.* The *Ball* Court wrote that government acts create the danger of such illusions whenever it "fosters a close identification of [government's] powers and responsibilities with those of . . . religious denominations." *Id.* at 389. The evil the Court saw in the "symbolic union" was not that it could mislead people, but that it would "be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *Id.* at 390. Children, the Court held, are especially susceptible to this deceiving form of flattery or offense, since they "would be unlikely to discern the crucial difference between the religious school classes and the 'public school' classes." *Id.* at 391.

The majority in *Grumet* found a "symbolic union" was effected merely by establishing a school district with boundaries that paralleled those of the Satmar Hasidic community. As a result, Satmar Hasidic children would go to its schools and

Satmar Hasidic voters would likely elect Satmar Hasidic school board members. *Grumet*, 81 N.Y.2d at 529, 601 N.Y.S.2d at 67. How this action effected "a union of church and state" is left to conjecture.[6] Indisputably a secular public school system was set up in the midst of people belonging to a single religious sect. But certainly this does not constitute a "union of church and state in one sectarian enterprise" or the "close identification" of government's powers with those of a religious denomination. Not only does the court fail to identify anything that could be appropriately described as a "symbolic union," but it also fails to explain how the challenged state action conveys a message that New York State "endorses" the Satmar Hasidic religion. Nor does the decision expand on how children might be fooled into thinking it did. On a close reading, one cannot escape concluding that in *Grumet* the phrase "symbolic union" was simply used to label and, by labeling, to condemn an accommodation by government of religion with which the court felt uncomfortable. Though grandiloquent, the "symbolic union" concept proved in *Grumet* to be as ineffectual an analytical and evaluative device as did the *Lemon* "primary effects" test.

The growing use of a concept as contourless as "symbolic union" to condemn state action as *per se* violative of the Establishment Clause invites challenges to any church-state cooperations regardless of the resulting benefits to government. In *Grumet*, the handicapped children of Kiryas Joel were denied the benefits of special education services available to other New York school children. The same hollow rhetoric could be flourished to challenge the provision of health care services to AIDS sufferers -- however great the benefits to them and to the cash-starved municipalities where they live -- by organizations

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[6] Would the establishment of a public school district in the predominantly Irish Catholic neighborhoods of South Boston or Chicago in the 1960's have effected a symbolic union of church and state? Conversely, are Hasidim presumptively thought to be incapable of independently exercising their duties as citizens? Indeed, are the Hasidim being subject to special scrutiny because they are so open about their religiosity?

with religious affiliations. *Grumet* illustrates a reason why the touchstone of "symbolic union" should be expunged from Establishment Clause jurisprudence.

This Court has recognized the core flaw of the "symbolic union" touchstone: "it could be argued that any time a government aid program provides funding to religious organizations in an area in which the organization also has an interest, an impermissible 'symbolic link' could be created, no matter whether the aid was to be used solely for secular purposes." *Bowen*, 487 U.S. at 613.

C. The Endorsement Test in *Grumet* Provides No Constitutionally Principled Measure of the Reach of the Establishment Clause

The Court of Appeals also objected to Chapter 748 on the ground that it could be perceived as state-endorsement of the Satmar Hasidim's religion. Specifically, the Court felt New York legislators made such excessive efforts to accommodate the Satmar Hasidim they amounted to an endorsement. *Grumet*, 81 N.Y.2d at 531, 601 N.Y.S.2d at 68. The dynamic intrinsic to the endorsement test applied by the Court of Appeals is hostile to religion in that it demands that accommodations by government to religion must be kept to an absolute minimum.

The Court of Appeals, having once concluded that all the special education services the Satmar Hasidic handicapped children needed were "already available," inevitably found that Chapter 748 was unnecessary. Apparently, not only the benefit was suspect, but its recipients as well, since the court indicated "the Legislature may not treat the Satmar community as separate, distinct and entitled to special accommodation." *Id.* *But see, e.g., Harris v. McRae*, 448 U.S. 297, 319 (1980) ("it does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions'"). The court characterized the benefit as a religious one since a separate school district dovetailed with what the court

saw as the Satmar Hasidim's "separatist tenets." *Grumet*, 81 N.Y.2d at 531, 601 N.Y.S.2d at 68. The Court of Appeals interpreted this in and of itself as a message of endorsement and therefore an excessive accommodation of religion. In the same spirit, in her concurrence, Chief Judge Kaye proposed a "preferred analytical framework" that was premised on the minimalist credo which may be described as the "least-religious-means test" or "more-secular-alternative test," *Allegheny*, 492 U.S. at 676-77. That this analytic framework is inimical to religion has not been disguised by its proponents. "Concern for the position of religious individuals in the modern regulatory state cannot justify official solicitude for a religious practice unburdened by general rules; such gratuitous largesse would effectively favor religion over disbelief." *Weisman*, 112 S.Ct. at 2677 (Souter, J., concurring). *See also Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in judgment) ("The necessary second step [in evaluating an Establishment Clause challenge to a Free Exercise accommodation] is to separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations").

Like the "symbolic union" touchstone, the endorsement test is also based on subjective perceptions: state action is forbidden if it "conveys a message of endorsement of religion." Furthermore, the endorsement test fails to identify what is being looked at and who is looking. (As to the latter, is it someone, as suggested by the *Grumet* dissent, who is "suffer[ing] from a predisposed hostility to religion in the constitutional debate sense"? *Grumet*, 81 N.Y.2d at 552, 601 N.Y.S.2d at 82 (Bellacosa, J., dissenting)).

Proponents of the endorsement test seek to bring some semblance of impartiality to its use by reading in an "objective

observer" requirement.[7] "The relevant issue is whether an objective observer, acquainted with the text, legislative history and implementation of the statute, would perceive it as a state endorsement [of religion]." *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring in judgment); *see also Allegheny*, 492 U.S. at 632 (O'Connor, J., concurring in part and concurring in judgment) (in free exercise cases "a reasonable observer would take into account the values underlying the Free Exercise Clause in assessing whether the challenged practice conveyed a message of endorsement"). The endorsement test was first proposed as a "refinement" to the *Lemon* effects test. *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring in judgment). But in the end, it provides courts with no better guidance than *Lemon*, because whatever steps an observer would have to take to be objective or reasonable are what would and should be the actual test of constitutionality. The endorsement test is, therefore, a test with no real content and leaves courts with nothing more than a label that can be used to condemn any accommodation not required by the Free Exercise Clause.

Finally, the endorsement test lacks a constitutional basis. The express rationale for the endorsement test is that government endorsement of religion conveys a message to non-adherents that they are "outsiders." *Lynch*, 465 U.S. at 701 & n.7 (Brennan, J., dissenting). This is then linked to religious liberty by the argument that "religious liberty . . . is infringed when the government make[s] adherence to religion relevant to a person's standing in the political community." *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring in judgment). Should "an extensive effort to accommodate religion" amount to an impermissible "endorsement" and thereby bring it within the constitutional limitations imposed by the Establishment Clause? Or, should this variation on a theme of "perception" require some additional element? Under the present scheme, the decision-makers are left

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[7] The Court of Appeals does not adopt the "objective observer" requirement, noting that "'the Supreme Court has not yet adopted [this] nuance . . . .'" *Grumet*, 81 N.Y.2d at 528, 601 N.Y.S.2d at 66.

with little on which to rely in reaching a conclusion. There is nigh universal agreement that the decisions under this Court's Establishment Clause jurisprudence are, at best, difficult to reconcile. All too often, they appear to treat religion as something to be curtailed and isolated at all costs. This neither reflects the historical purpose of the First Amendment nor represents a socially defensible policy.

II. AS THE MEASURE OF THE REACH OF THE ESTABLISHMENT CLAUSE, THIS COURT SHOULD BAR GOVERNMENT COERCION AND PROSELYTIZATION

The Establishment and Free Exercise Clauses pay heed to the fundamental value of religious liberty and reflect the principle that individual religious exercise should be allowed to flourish free from coercive governmental interference. From separate but complementary perspectives, the two Religion Clauses serve the purpose of protecting religious liberty and maximizing individual religious autonomy. The Establishment Clause prohibits the government from forcing religious practice on an individual. The Free Exercise Clause prohibits the government from interfering with an individual's religious practice.

In consonance with these principles, this Court should adopt a rule construing the Establishment Clause which preserves religious liberty. The *Amicus* respectfully submits that a rule which bars government from coercing an individual by force of law to practice or to affirm any religion or to give personal financial support to any sect would satisfy these criteria. *See infra*, Point II-B; *see also Weisman*, 112 S.Ct.at 2683 (Scalia, J., dissenting); Michael Paulsen, *Lemon is Dead*, 43 Case W. Res. L. Rev. 795 (1993). In addition, an Establishment Clause rule should bar government from proselytization in support of any particular sect or religion. *See infra*, Point II-C.

A. The Establishment Clause Was Historically Intended Not to Isolate Religion but to Maximize Religious Liberty

The text of the Establishment Clause and the history surrounding its adoption must form the starting point for analyzing its purpose and scope. As has long been recognized in the Establishment Clause context and elsewhere, "the line [the Court] must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers." *Schempp*, 374 U.S. at 294 (Brennan, J., concurring).

The sterile metaphor of a symbolic wall, impregnable and unscalable, between church and state has bedeviled the caselaw dealing with the Establishment Clause, especially since the end of the Second World War. This concept of a wall-of-separation erected by the Establishment Clause is not derived from the Constitution, but instead is drawn from correspondence written by Thomas Jefferson while in France, some 14 years after the adoption of the First Amendment. Justice Rutledge in his dissent in *Everson v. Bd. of Educ.*, 330 U.S. 1, 31-32 (1947) (Rutledge, J., dissenting) proclaimed the purpose of the Establishment Clause was "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." In *McCollum v. Bd. of Educ.*, 333 U.S. 203, 213 (1948) (Frankfurter, J.), Justice Frankfurter noted that the "wall-of-separation" metaphor did not foreclose a clash of views as to what the wall separates and was, in the abstract, of little assistance in deciding the reach of the Establishment Clause. Nonetheless, the imagery stuck.

Chief Justice Rehnquist has pointed out that "Jefferson's misleading metaphor" is based on a mistaken view of the history surrounding adoption of the Establishment Clause. *See Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting) ("There is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was

constitutionalized in *Everson*"); *see also* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933, 933 (1986) [hereinafter, *"Coercion"*]. As one commentator has argued:

> [W]hat is most vital, in coming to a sensible understanding of the clause, is to avoid the ahistorical conclusion that its principal purpose is to protect the secular from the religious, an approach that, perhaps inevitably, carries us down the road toward a new establishment, the establishment of religion as a hobby, trivial and unimportant for serious people, not to be mentioned in serious discourse. And nothing could be further from the constitutional, historical, or philosophical truth.

Carter, *supra*, at 115.

The historical background addressed by Chief Justice Rehnquist in his dissent in *Wallace* and elsewhere by others, *see Coercion, supra*, at 933-41, refutes the notion that the Framers viewed religion as something to be banished from the public sphere. The Establishment Clause was aimed at forestalling attempts by the government to force religious beliefs and practices on its citizens. The exactions and abuses the Framers had in mind were colonial laws requiring church attendance and compelling adherence to religious beliefs, as well as laws disqualifying people of certain religious beliefs from holding office and taxing individuals to support a favored or "Established" church. It is in that context that James Madison introduced what ultimately became the Establishment Clause. The "legislative history" surrounding the First Amendment states that Madison "apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 Annals of Congress 730 (J. Gales Ed. 1834) (Aug. 15, 1789), *quoted in Wallace*, 472 U.S. at 95 (Rehnquist, J., dissenting).

This Court has also, on occasion, looked to Madison's *Memorial and Remonstrance Against Religious Assessments* (1785) [hereinafter *"Memorial and Remonstrance"*] in its attempts to discern the Framers' understanding of the Establishment Clause. *Memorial and Remonstrance* emphasizes Madison's concerns about legal compulsion of religious belief. As one commentator has noted:

> It states: (1) that the proposed bill for the support of teachers of the Christian religion would be a "dangerous abuse" if "armed with the sanctions of a law"; (2) that religion "can be directed only by reason and conviction, not by force or violence"; (3) that government should not be able to "force a citizen to contribute" even so much as three pence to the support of a church; (4) that such a government would be able to "force him to conform to any other establishment in all cases whatsoever"; (5) that "compulsive support" of religion is "unnecessary and unwarrantable"; and (6) that "attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general." Again, legal compulsion to support or participate in religious activities would seem to be the essence of an establishment.

Coercion, supra, at 938.

Nonetheless, any analysis of the Establishment Clause focusing primarily on government coercion has been criticized on the ground that government action coercing religious exercise "would virtually by definition violate [the] right to religious free exercise," and therefore such analysis would "render the Establishment Clause a virtual nullity." *Weisman*, 112 S.Ct. at 2673 (Souter, J., concurring) (citations omitted); *see also* Douglas Laycock, *'Nonpreferential' Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 922 (1986). This attack is misplaced. A coercion standard, even standing alone, would not leave the Establishment Clause without independent meaning. Rather, the Establishment and Free

Exercise Clauses protect religious autonomy in different ways, with each Clause playing a separate role. Under the Free Exercise Clause, the government cannot stop someone from engaging in religious exercise. By contrast, under the Establishment Clause, the government cannot make someone engage in religious exercise. The Court recognized this in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940): the "constitutional inhibition . . . has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. . . . On the other hand, it safeguards the free exercise of the chosen form of religion." *See also* Michael Paulsen, *Religion, Equality and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 Notre Dame L. Rev. 311, 312 (1986).

Moreover, the Establishment Clause protects non-believers. *See, e.g., Torcaso v. Watkins*, 367 U.S. 488 (1961). By contrast, the Free Exercise Clause typically has been interpreted only to prevent the government from burdening the free exercise of one's religion, not one's lack of religious belief. *See, e.g., Thomas v. Review Bd.*, 450 U.S. 707, 713 (1981) ("Only beliefs rooted in religion are protected by the Free Exercise Clause"); *Marsh v. Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting) ("Under the Free Exercise Clause, religiously motivated claims of conscience may give rise to constitutional rights that other strongly held beliefs do not").

The fact that the protections accorded by the Free Exercise and Establishment Clauses may at times overlap does not render the Establishment Clause a nullity. *See McDaniel*, 435 U.S. at 630-42 (Brennan, J., concurring in judgment) (statute barring clergy from office found to violate both Establishment and Free Exercise Clauses). Plainly, any interpretation treating the Establishment Clause as redundant of the Free Exercise Clause must be "a reading of last resort," *Weisman*, 112 S.Ct. at 2673 (Souter, J., concurring). A sounder interpretation that avoids this problem is that the two clauses must be viewed as playing complementary and symmetrical roles in preserving religious

autonomy. Surely this makes more sense than assuming that the Framers began the Bill of Rights by setting forth back-to-back contradictory premises. More importantly, the concern that a standard based solely on coercion would make the Establishment Clause meaningless is eliminated once it is recognized that this clause also bars government-sponsored proselytization.

In his concurrence in *Weisman*, Justice Souter falls short of saying that historical analysis unequivocally supports the "presumption" that the clause stands for "something more" than a bar on government coercion. Instead the conclusion is made that history does "not reveal the degree of consensus" necessary to challenge the "presumption," since at the time of ratification "a respectable body of opinion supported a considerably broader reading" of the Establishment Clause than one limited to "coercion." *Id.* at 2673-76. No specific reference is made to the historical record as to the concrete government action the Establishment Clause was intended to bar in addition to coercion. Instead, the assertion is made that the "more" is equivalent to "what, in modern terms, we call official endorsement of religion." *Id.* at 2674.

For example, the concurrence quotes Madison's statement in his *Memorial and Remonstrance* that an assessment to support churches is improper because "it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the legislative authority." *Id.* Although the concurrence suggests that the quoted language describes conduct involving "an official endorsement of religion," *id.*, it appears to be nothing more than a reference to the government coercion involved in an assessment.

To the extent the Framers intended the Establishment Clause to bar more than coercion, they appear to have intended to bar government-sponsored proselytization. The concurrence refers to President Jefferson's reasons for refusing to issue

Thanksgiving proclamations, set forth in a letter written a quarter-century after adoption of the First Amendment:

> [I]t is only proposed that I should *recommend*, not prescribe a day of fasting & prayer. . . . It must be meant that this recommendation is to carry some authority, and to be sanctioned by some penalty on those who disregard it; not indeed of fine and imprisonment, but of some degree of proscription perhaps in public opinion.

Id. While Justice Souter suggests that Jefferson's statement was prompted by concerns about "endorsement of religious belief and observance," *id.*, it could just as easily be read to reflect Jefferson's sensitivity about the dangers of government proselytization.[8]

In sum, the historical record supports the view that the Establishment and Free Exercise Clauses should be construed as two distinct aspects of an effort to foster and protect religious liberty. To achieve that goal, the Establishment Clause promotes religious liberty by barring both government coercion by force of law and proselytization by the government.

B. The Scope of the Rule Against Coercion

As this Court recently recognized, "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Weisman*, 112 S.Ct. at 2655. However, prior to *Weisman*, this Court had not considered the precise kind of coercive force prohibited by the Establishment Clause. It was

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[8] Of course, such a general, non-denominational exhortation to prayer never has been challenged, nor should it ever be reasonably challenged, as impermissible government-proselytization. Rather, it is a government acknowledgement of religions positive value in society. Of course, no approach is inhuman from distortion by those with a pre-conceived agenda.

chiefly this question which divided the Court in *Weisman*. The dissent argued that prohibited coercion should be limited to that which is "*by force of law and threat of penalty*," *id.* at 2683; and saw no such force operative with respect to the invocation delivered at the graduation. The majority, wrongly in our view, characterized the rabbi's invocation as a "state-sponsored religious activity,"[9] *id.* at 2655, and unduly strained to find psychic coercion of the students in that "the State ... require[d] one of its citizens to forfeit ... her rights and benefits at the price of resisting conformance to state-sponsored religious practice."

The Constitution would have been better served had the Court scrutinized the invocation for impermissible government-proselytization, *see infra*, and left the time-tested meaning of coercion untouched. "Psychic coercion" is too malleable a concept to serve as a guidepost.

Like state-compelled attendance at worship services, government-coercion of persons to provide direct financial support to religious sects violates constitutionally protected religious liberty. Therefore, laws such as those that compelled tithing or required citizens to make personal payments to sects are barred by the Establishment Clause.

The principle and result are the same when government levies an assessment in support of sects. Indeed, a traditional hallmark of religious establishment is direct state financial support of sects. On this there seems to be unanimity. "The Framers adopted the Religion Clauses in response to a long tradition of coercive state support of religion, particularly in the

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[9] The majority apparently found that school officials by giving the rabbi guidelines, including a pamphlet prepared by the N.C.C.J., assisted in the composition of the prayer and transformed the invocation into a state-sponsored religious exercise. The invocation itself cannot be construed as government-proselytization.

form of tax assessments." *Id.* at 2673 (Souter, J., concurring). "I will acknowledge for the sake of argument that by 1790 the term 'establishment' had acquired an additional meaning -- 'financial support of religion generally, by public taxation' -- that reflected the development of 'general or multiple' establishments, not limited to a single church." *Id.* at 2683 (Scalia, J., dissenting) (citation omitted). Religious assessments compel the individual to participate financially and personally in religion. That the assessed funds earmarked for sectarian support may first pass through the hands of government does not in any respect differ from a law that requires the citizen to hand his money over to this or that church.

Nor is there any difference in principle or result when the state provides financial support from general revenues directed by the government to support exclusively religious activities. Under these circumstances, the state has not separately identified as religion-bound the dollar it takes it from the taxpayer, but that does not diminish the payor's forced personal financial participation in religion.

What is common to laws compelling direct payments to sects, assessment taxes, and government financing solely to religious activities is that government is both compelling payment and making the choice that the payment will support religion. In each case, the payor is compelled to personally participate in religion through the direct use of his money.

A wholly different situation obtains when government programs confer general benefits to persons regardless of their religious or other affiliations. In that case, the taxpayer is supporting the government programs, not sects, and the government does not make the choice of supporting or not supporting religion. For example, in the case of public aid received by parents of private school students as educational support, if such aid is used by a parent to send a child to a church-related private school, the choice is the parent's, not the government's. The government's role has only been to make the

educational aid available to parents of all non-public school students.

This Court has recognized that where the ultimate decision regarding funds originating from government is made by "genuinely independent and private choices of aid recipients," *Witters*, 474 U.S. at 487, an "impermissible 'direct subsidy'" of religion does not result. *See also Zobrest*, 113 S.Ct. at 2467 ("the [challenged] statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents"); *Mueller v. Allen*, 463 U.S. 388, 399 (1983) ("under [the challenged statute] public funds become available only as a result of numerous private choices of individual parents [and this is a] material consideration in Establishment Clause analysis"). The underlying reasoning is that "the decision to support religious [activity] is made by the individual, not by the State." *Witters*, 474 U.S. at 488.

To take a different example, courts have upheld the receipt of public funds by religiously sponsored institutions, such as hospitals, child care agencies and the like, notwithstanding their religious affiliation, because the use of such funds are for the support of governmentally recognized and badly-needed social services and not for the support of religion. The use of taxpayers' funds solely to advance an institution's religious beliefs would constitute a form of improper financial coercion barred by the Establishment Clause.

C. The Establishment Clause Forbids Government Proselytization in Support of Religious Sects and Sectarian Tenets

The Court in *Marsh v. Chambers*, 463 U.S. at 794 upheld legislative prayers on the ground there was "no indication that the prayer opportunity has been exploited to proselytize . . . anyone". *See also Allegheny*, 492 U.S. at 660 (Kennedy, J., concurring in judgment in part and dissenting in part) (Establishment Clause forbids "governmental exhortation to

religiosity that amounts in fact to proselytizing"); *Engel v. Vitale*, 370 U.S. at 439 (Douglas, J., concurring) (prayer composed by New York State Board of Regents to be recited by public school teachers "is of a character that does not involve any element of proselytizing as in the *McCollum* case").

Although non-coercive, government proselytization in support of religious sects and sectarian tenets infringes on religious liberty and is barred by the Establishment Clause. But since this state action does not impose a burden on a person's existing beliefs, government proselytization is not vulnerable to Free Exercise challenge.[10]

Unlike the vague and often wholly subjective concept of "endorsement," which may include any act that could be interpreted by someone as reflecting government's attitude toward religion, proselytization is *intentionally expressive* and limited to acts designed to communicate a message directed to its recipient's will. Thus, the rule against proselytization does not bar government from acknowledging (as this Court itself has done on occasion) that many religions are the font of innumerable civic virtues.

Government proselytization is constitutionally forbidden as it encroaches on religious liberty in several fundamental ways. Although it does not force or compel religious belief or practice but seeks instead to persuade assent, it targets the core of religious liberty, the individual's exercise of free will in making religious choices. While it does not negate or override free will

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[10] "Proselytization" refers to expressive acts intended to persuade people to adopt particular religious beliefs or practices. Genuinely religious choices are acts of free will. Hence, proselytization is fundamentally non-coercive. Proselytization, while falling within the scope of "endorsement," is far more specific and identifiable. *See Weisman*, 112 S.Ct. at 2683-84 (Scalia, J., dissenting)

(as coercion does), government proselytization in support of a sect or sects may interfere with the freedom of religious choice.

Any determination of whether government acts amounted to proselytization would require a factual analysis of whether the government's expression was intended to persuade people to adopt a particular religious belief. This would largely be a question of degree. Justice Kennedy intimates as much:

> Symbolic recognition or accommodation of religious faith may violate the Clause in an extreme case. I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. This is not because government speech about religion is *per se* suspect, as the majority would have it, but because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion. . . . There is no realistic risk that the crèche and the menorah represent an effort to proselytize. . . .

Allegheny, 492 U.S. at 661, 664 & n.3 (Kennedy, J., concurring in part and dissenting in part).

The prohibition of government proselytization is limited to proselytization in support of the tenets of particular sects and does not bar government from expressing support for or commending to its people "religion in general." This follows from the simple fact that "religion in general" can never become "established" in the constitutional sense. Only concrete, particular manifestations of religion as practiced by individuals can be established in the constitutional sense, or for that matter in any real sense. It makes no sense to assert that the Framers intended to prohibit attempts at the impossible. Can anyone draft a law that establishes "religion in general"? Can anyone even describe what established "religion in general" would look like? Even historical "ecumenical establishments" or "nonpreferential establishments" established only those discrete religions that were

practiced by their adherents in governments that sponsored such establishments. To the extent a "civil religion," *see*, *Weisman*, 112 S.Ct. at 2656, is in fact a religion and not merely a social analyst's abstract construction, proselytization by the government in its support would be forbidden. However, to the extent government commends common religious values, religiosity or the virtues of developing the religious dimension of human life, it does not violate the Establishment Clause.

It is emphatically not the case that "the Constitution forbids schools to encourage students to become well rounded as student-worshippers." *Westside Comm. Bd. v. Mergens*, 496 U.S. 226, 265-66 (1990) (Marshall, J., concurring in judgment). Given the multitude of pernicious and destructive encouragements our students receive today, surely it bespeaks a "callous indifference," indeed "hostility," to our students to bar encouragement to practice, and practice earnestly, whatever religion they have chosen. What the Constitution does prohibit, and all that it prohibits in this area, is state proselytization of students in favor of a particular religion.

Applying the coercion and proselytization rules to the government action at issue, the creation of a public school district for the handicapped children of Kiryas Joel passes constitutional muster. The law challenged in *Grumet* does not violate the Establishment Clause's prohibition against government coercion. Chapter 748 does not coerce anyone by force of law or otherwise to support or participate in any religious exercise. The law merely creates a public school district, like any other but for the fact that its pupils are all of the same religious sect. No one is required to attend.

Moreover, there is no direct financial support of religion; thus far, "perceptions" have brought about the results below. Although solely a facial challenge, even the presence of a totally secular school for the disabled is not and can not be unconstitutional under the First Amendment solely due to the uniform religion of its pupils.

Likewise, neither the creation of the public school district nor its existence and operation constitute government proselytization. The State of New York was not intentionally trying to persuade anyone to adopt a particular religious belief. Indeed there is no religious element to the government's action at all. It has merely created a public school district.

CONCLUSION

The judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

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